Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No._____

In The

Supreme Court of the United States

Oscar L. Thomas, Pro Se

Petitioner,

v.

R. James Nicholson, Secretary, United States Department of Veterans Affairs, in his Individual Capacity, et al

Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals for the District of Columbia Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioner Oscar L. Thomas, ("Thomas") is an U.S. Army Retired Senior Non-Commissioned Officer with 25 years of honorable military service, to include wartime service. Upon retirement from military service on July 31, 1989, Thomas, because of his service and the unseen wounds and scars of military service, filed claims for service-connected disability benefits with the Department of Veterans Affairs (VA).

In the processing and adjudication of his claims for those benefits, Thomas claimed that VA employees committed tortuous acts and omissions that caused him serious injury. When the VA failed or refused to properly re-adjudicate his veteran's benefit claims disputes, Thomas appeal his veteran's benefit claims disputes to the Board of Veterans Appeals (BVA) and the Veterans Court through the Veterans Judicial Review Act (VJRA), 38 U.S.C. § 511(a), and for his alleged common law tort claims based on acts and omissions of medical malpractice and other torts, filed civil suit in the United District Court for the District of Columbia.

As explained in the Initial Petition, these claims are now inextricably intertwined constituting a jurisdictional conflict that this Court is being asked to resolve by underlying Writ of Certiorari Number 09-411.

The claims and issues being presented in this second Writ all grew out of claims from an underlying original complaint, (02-cv-1743), now pending for 7 years, into the current case (07-cv-0598). This (07-cv-0598) case was split by the district court's December 11, 2008 Memorandum and Order sau sponte dismissing claims alleged against judicial and non-judicial governmental actors. Claims against those remaining governmental actors, as a result of the split, are still pending before the district court as part of the two underlying cases, DC District Court Civil Actions (02-cv-1743) and (07-cv-0598). Because each of the underlying cases was improperly decided, this Court is being asked to grant Certiorari to consider the correctness of the rulings and to reverse.

1. Whether the district court properly dismissed Petitioner's constitutional and common law tort action against the judges, " because they are absolutely immune from liability for damages for actions taken in the course of their official capacities", and against government officials and federal employees "because they are also immune, when and where it is alleged and shown that they, in fact, had acted without subject-matter jurisdiction, " all jurisdiction" in adjudicating a FTCA case, and where the action was taken clearly outside the scope of their Article III constitutional and federal statutory jurisdictional authority?

2. Whether the named judges were legally required to recuse themselves from the two cases involving Petitioner at the instant each were notified of Petitioner's complaint of judicial misconduct against them; and most certainly when the Petitioner specifically requested the presiding judge in the second case (07-cv-0598) to recuse himself and/or allow Petitioner to file an Amended Complaint naming Judge RJL, the then presiding judge, as a defendant in the case in which he was presiding? And,

3. Whether the District Court Complaint stated a Constitutional Violation?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1, the following list identifies all of the parties appearing here and in the court below.

The Petitioner here and in the United States Court of Appeals for the District of Columbia is Oscar L. Thomas, Pro Se.

The Respondents here and in the United States Court of Appeals for the District of Columbia are:

1) R. James Nicholson, Defendant/Respondent
2) Paul G. Thomason, Defendant/Respondent
3) Ellen S. Huvelle, Judge/Defendant/Respondent
4) Deborah A. Robinson, Judge/Defendant/Respondent
5) Rosemary M. Collyer, Judge/Defendant/Respondent
6) Alan Kay, Judge/Defendant/Respondent
7) Jeffrey A. Taylor, Defendant/Respondent
8) Rudolph Contreras, Defendant/Respondent
9) Richard b. Rosse, M.D., Defendant/Respondent
10) Robin M. Meriweather, Defendant/Respondent

Pursuant to Rule 29.6, Petitioner states that no parties are corporations.

* At some point in the litigation, Eric Ken Shinseki was substituted for his predecessors, R. James Nicholson and Erick K. Peake, as Secretary, Department of Veterans Affairs, per Rule 43(c)(2) of the Federal Rules of Appellate Procedure.

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I. Review is warranted because:

A. The district court never acquired Article III Federal Statutory "Subject-Matter Jurisdiction" over Petitioner's FTCA case under provisions of the FTCA and its framework; and because all of the district court's rulings, decisions and opinions grant dismissal and summary judgement to the Defendants/Respondents were improper, as not taken in accordance with District of Columbia, Federal law and Supreme Court Precedence, and are null and void. For this single and very important reason alone, the petition or writ of certiorari should be granted.....13

B. Review is warranted because, in granting motion to dismiss and for summary judgment, the lower court departed from the accepted standard of review set by this Court in *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097, 68 USLW 4480, (U.S., Jun 12, 2000).....13

C. Review is warranted because the DC Circuit also lacking appellate jurisdiction to review and rule on the merits of this case, improperly sanctioned the district court's dismissal and summary judgment opinion on the issue, standard and application of law for claim accrual, exhaustion of administrative remedies, and expiration of statute of limitation under the FTCA. 28 U.S.C. § 2401(b) in this case.....14

D. Review is warranted because the *Per Curiam* Summary Action Order issued by the 3-Judge Panel of the DC Circuit conflicts with all discernable opinions of all other Circuit Courts, as well as its own discernable opinions that have ever addressed this same important matter or question(s), which is "whether, in this case, the district court had Article III Federal Statutory Subject-mater Jurisdiction to hear/review and/or to adjudicate this Case under the FTCA framework"; that constituted protrusion and unauthorized reviewed an inextricable intertwined veteran's benefit claims and FTCA

claim that "The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans." And, that "The decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise, and because the Order also conflicts affirmations contained in Opinions of this Court.....14, 15

E. The district court's rulings, and the DC Circuit's affirmation, if allowed to stand and become precedence, will have a very chilling and damaging effect on every veteran's rights who may need and has to apply for veteran's disability benefits form the VA, and will constitute and sanction court-intervention, protrusion, intrusion and unauthorized reviewed of inextricable intertwined veteran's benefit claims decisions and FTCA claim at the request of the Secretary himself when "The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans." And, that "The decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise, and because the Order also conflicts affirmations contained in Opinions of this Court.....15, 16

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The Summary Affirmance Order of the DC Appellate Court affirming the opinion of the district court whose

review is sought is reproduced in the Appendix at A-1 - A-3 and unreported.

The District Court's Memorandum Opinion of Dismissal December 11, 2008, Dismissing Defendants/Respondents is reproduced at A-4 - A-5 and is unreported.

JURISDICTION

Jurisdiction is proper in this Court. The U.S. District Court for the District of Columbia judgment sought to be reviewed was entered on December 11, 2008. Subsequently, on January 5, 2009, the trial judge denied a Motion for Reconsideration.

Jurisdiction of this Court is invoked under rule 10(c) which provides that review should be granted when the court below "has decided an important question of federal law which has not been, but should be settled by this Court..." Supreme Court Rule 10(c).

The District of Columbia Court of Appeals for the District of Columbia Circuit affirmed the district court judgment by Summary Affirmance Order entered on August 19, 2009. No Petition for Rehearing and Rehearing En Banc was filed because a Petition as to the underlying related DC Circuit Opinion, Action # 09-4359 and appealed to this Court by Writ and is Docketed as No.: 09-411.

The present Petition for Writ of Certiorari is filed within 90 days of the District of Columbia Circuit's Affirmance Order of the District Court's Opinion of Dismissal of August 19, 2009, and is timely pursuant to 28 U.S.C. §§1257 and 2101(c) and Rule 10(1)(c) of the Rules for the U.S. Supreme Court.

The jurisdiction of this Court to review the Judgment of the DC Circuit is invoked under 28 U.S.C. § 1254(1).

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STATEMENT OF THE CASE

Pro Se Petitioner, Oscar L. Thomas ("Thomas" or Petitioner), a United States Army Honorably Retired and Disabled Veteran, respectfully prays that a Writ of Certiorari be granted to review the correctness of the decisions of the United States (US) District Court for the District of Columbia (DC District Court) for wrongfully "sau sponte" dismissing Petitioner's district court complaint alleging both constitutional and common law tort claims filed in DC district court against four (4) DC District Court and Magistrate Judges and other federal actors in their individual capacities.

The complaint (here not included) claimed that each judge and the other defendants acted without any ("subject-matter-jurisdiction"), ("all jurisdiction") and in a conspiracy to deny Petitioner his constitutional and civil rights.

On December 11, 2008, without any court proceedings being conducted, to include not holding a hearing or requiring any answer to the complaint by any defendant, the district court sau sponte dismissed the complaint and claims against all 4 of the judges named in the complaint for lack of subject-matter jurisdiction under Fed.R.Civ.P., Rule 12(h)(3), based on their "absolute immunity" for their "judicial acts" as to Plaintiff's/Petitioner's allegedly allegations that each acted or conspired to act without any ("subject-matter-jurisdiction"), ("all jurisdiction") to deny Plaintiff/Petitioner his civil rights by dismissing and/or granting summary judgment to a number of other federal defendants or officials in an underlying (02-cv-1743) complaint. Pet's App. at A-3 - A-4.

This current complaint also named other additional federal employee-defendants, officials and actors in the complaint in their individual capacities for constitutional and common law tort violations and of federal statues. The district court has also now dismissed the remaining defendants from the complaint based on their alleged claims of "qualified immunity" or other immunity under the Federal Tort Claims

Act (FTCA)'s "discretionary functions exception" and/or its provisions. The United States Court of Appeals for the District of Columbia Circuit (DC Circuit) has affirmed the district court's opinions in its Civil Action #'s 09-5349 and 5138, not here included.

A. Facts Giving Rise To This Case

This Petition arises from claims filed in a DC District Court Complaint, (Civil Action 07-cv-0598), growing out of claims filed in an original complaint previously filed in this same DC District Court, (Civil Action 02-cv-1743), (not here included) and (hereafter referred to as the "underlying complaint", or "underlying case"), alleging claims and allegations of wrongful or negligence acts or omissions by the Secretary, Department of Veterans Affair and 15 other federal employees filed in a district court complaint under the Federal Tort Claims Act, 28 U.S.C.§§ 1346(b), dated August 30, 2002, and which is directly related to Petitioner's Petition for Writ of Certiorari, Civil Action Number: 09-411, filed in this Court on October 6, 2009.

It, like the initial filing, presents a very unique set of unlikely, bizarre and unusual legal imparities, facts, unfortunate circumstances, and important questions of law, including veterans law questions, growing out of and relating to the above stated underlying case warranting grant of Writ of Certiorari to resolve. It alleges by Petitioner that the named judges acting in these cases conspired with each other and other federal government employees and officials and private actors in committing constitutional and common law torts and other statutory violations to deny Plaintiff/Petitioner his constitutional due process and equal protection and civil rights, by acting without constitutional or statutory authority, e.g., (by acting without subject-matter jurisdiction) with other named ("US Justice Department") federal officials/federal employees and private actors to injury

and deny, constituting their own conspiracy and violations of law as alleged against them in the complaint.[1]

Petitioner incorporates herein by reference Petitioner's Petition for Writ of Certiorari, Petition Number: 09-411, filed and docketed in this Honorable Court on October 6, 2009, and the complete and total underlying district and appellate court-case records files in cases numbers: District Court 02cv1743, 07cv0598, and Appellate Court case files Numbers: Civil Actions 5182 (January 14, 2005), 08-5943 and 09-5138, which

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[1]Specifically, the underlying case and claims therein involves the Secretary, VA who is the chief decider and final arbiter on all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors; who is also a defendant in two civil lawsuits, Civil Actions #'s (02-cv-1743) and (07-cv-0598), involving claims, allegations and questions against him and his agency employees and a single veteran involving inextricably intertwined veteran's benefit claims and non-benefit tort claims, where he has to consider and decide a benefit claim decision and questions as to when the veteran first received his prior "Statement of the Case (SOC) Decision" that will ultimately determine his ("veteran's benefit decision") as to if and when the veteran will receive certain veterans benefits; while at the same time, as to these questions, he has/is obartrarily and in his own self-interest, prejudicially, unfairly and without affording the veteran his statutory due process right in accordance with the Veterans Judicial Review Act (VJRA) and the Veterans Claims Assistance Act (VCAA), advocating, urging and arguing before the lower courts and now this Honorably United States Supreme Court that [it] should, in essence, answer this/these ("veteran's benefit question(s)") and render the decision for him and to him that he himself has yet to answer or make, but for which he alone is statutorily and lawfully is required/must/shall answer and make while affording the veteran his due process rights as mandated by the cited VA federal statues, the VJRA and VCAA. Questions on decisions that he has yet to answer/make, but which the lower courts have already directly or indirectly decided by their alleged illegal action and court decisions, which he is now directly relying on and will continue to rely on to deny the veteran's claims for veteran's benefits. Also, in this regard, the Secretary, VA also has a conflict of interest and owed duty to the veteran that the Secretary "shall" rendered his own independent decisions based on and in accordance with the cited VA Rules, Regulations and the Federal the Laws. Specifically, 38 U.S.C. § 511(a).

are all ripe and timely appealed to this Court under DC Circuit Appellate Court Decision 08-5943 and docketed under Writ 09-411.

Growing out of proceedings in the above referenced cases, the fulcrum of this controversy is that it involves Article III of the U.S. Constitution and the intersection of at least three federal statutes where it has been alleged that at least 4 federal district court and magistrate judges have acted and ruled on the merits of a number of complaints, (dismissing them), requiring appeals and injuring Petitioner, because, the district court acted without (subject-matter jurisdiction, indeed without ("all jurisdiction") in the first instance.

B. The District Court Proceedings

On March 28, 2007, for claims of injury and damages growing out of Petitioner's underlying case, (US District Court Civil Action 02-cv-1743), Petitioner filed a new action (07-cv-0598, for constitutional and common law tort claims against four (4) DC District Court Judges growing out of the same or similar acts or occurrences as alleged in the original underlying case, for their alleged illegally acting in the case, (Civil Action 02-cv-1743), specifically, for ("acting without subject-matter jurisdiction"), ("without all jurisdiction"), and for then acting in violation of federal statues, US Constitution and DC common law, (by conspiring with the Assistant United States US Attorney's defending in the case, with the Secretary, VA, a number of other federal employees and other private individuals to deprive Petitioner of his constitutional rights), e.g., (by committing various torts against Petitioner by acting and participating in the case where the Judges and Attorney's knew or should have known that the Court and the Judges had [n]o subject-matter jurisdiction, and [l]acked ("all jurisdiction") in the underlying case, violating and depriving Petitioner of his constitutional

and statutory due process and equal protection rights; and depriving Petitioner access to the courts.

On December 11, 2008, before any answer or responsive pleading was filed by any defendant named in this case, the presiding Honorable Judge, Richard J. Leon, hereafter ("RJL") issued a Memorandum Order, sau sponte dismissing the named defendant judges from the action under the Federal Rules of Civil Procedure, Rule 12(h)(3).[1] Plaintiff disagreed and on December 20, 2008, filed Motion for Reconsideration and to file a Third Motion to Amend the complaint, to include the naming of judge RJL as a defendant in the complaint. Pet's App. at A-5 - A-18. Judge RJL denied the Motion in its entirety, continued ruling, (even as to claims allege against him), and did not, as required, automatically recuse himself from the case. Whereas, because of his rulings, the case was then in essence, split by the dismissal of the judges. A timely a notice of appeal was taken to the DC Circuit Court of Appeals.

C. Appellate Court Proceedings

By Civil Action Case No. 09-5138, in an Unpublished Per Curiam Order dated August 19, 2009, the DC Circuit, citing *Taxpayers Watchdog, Inc. v. Stantley*, 819 F.2d 294, 297 (D.C. Circuit 1987)(per curiam), summarily affirmed the district court memorandum opinion and order of dismissal by ruling, citing *Marales v. Saco*, 502 U.S. 9 (1991), that (1) "the district court properly dismissed the action against the judges because they are absolutely immune from liability for damages for actions taken in the "course" of their official capacities, and (2) that there is (absolute immunity for Judges

[1] Rule 12(h)(3), Lack of Subject-Matter Jurisdiction, States:

> "If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."

from damages for "acts" committed in their judicial capacities), prompting Petitioner's filing of this Petition for Writ of Certiorari. See Pet. App. at A-1 – A-3.

D. Argument

1. Judicial Immunity Does NOT Apply In This Case

Based upon the true factual proceedings and circumstances in this case, Appellate and Supreme Court Law Precedence governing "judicial immunity", see *Bradley v. Fisher*, 80 U.S. at 352, judicial immunity does not apply in this case because this Court has said:

> "The necessary inquiry in determining whether a defendant judge is immune from suit is whether, at the time he took the challenged action, he had jurisdiction over the subject matter before him." *Stump v. Sparkman*, 435 U.S. 349 (1978).
>
> "Where there is ***no jurisdiction, there is no immunity***. A judge must be acting within his jurisdiction as to subject matter and person, to be entitled to immunity from civil action for his acts. *Davis v. Burris*, 51 Ariz. 220, 75 P.2d 689 (1938)."
>
> Long ago in *Bradley*, this court said:
>
> "A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over the subject-matter any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible."

"If a judge does not fully comply with the Constitution, then his orders are void and he is without jurisdiction, and engaged in acts of treason to the Constitution." See *U.S. v. Will,* 449 U.S. 200, 216, 101 S.Ct. 471, 66 L.Ed.2d 392, 406 (1980).

Therefore, as demonstrated by the district court docket proceedings and rulings, which are opposite of *Bradley*, shows that the trial judge(s) acted in the "clear absence of all jurisdiction" by hearing motions and issuing orders that affected the case and outcome, (the merits of the underlying case), since "jurisdiction over the subject-matter [*was not*] invested by law ... in the court which he [held]." *Bradley v. Fisher*, 80 U.S. at 352.

"When a judge acts intentionally and knowingly to deprive a person of his constitutional rights he exercises no discretion or individual judgment; he acts no longer as a judge, but as a "minister" of his own prejudices." *Pierson v. Ray*, 386 U.S. 547 at 568 (1967).

"When a judge knows that he lacks jurisdiction, or acts in the face of clearly valid statutes expressly depriving him of jurisdiction, judicial immunity is lost. *Rankin v. Howard,* (1980) 633 F.2d 844, cert den. *Zeller v. Rankin,* 101 S.Ct. 2020, 451 U.S. 939, 68 L.Ed 2d 326."

Here, the named judges lost their immunity by first acting without subject-matter jurisdiction, (without Article III constitutional and federal statutory authority), and by participating in a conspiracy to violate Plaintiff/Petitioner's civil rights through a nonjudicial or a judicial act - but in the clear and complete absence of subject-matter jurisdiction - as if they had that subject-matter jurisdiction. The district court also failed to consider, as alleged by the Petitioner in the amended complaint, the non-judicial character of the defendants' prior conduct in the underlying case. "(A)s the case (come) to" the Supreme Court, only a "judicial act" has been addressed by "(t) he courts below."

In federal tort law, judges cannot invoke judicial immunity for acts that violate litigants' civil rights. *Robert Craig Waters. Tort & Insurance Law Journal*, Spr. 1986 21 n3, p509-516. (Without question, the conduct alleged and described in the complaint clearly shows the defendants abridged and violated Plaintiff/Petitioner's civil rights, e.g., (specifically, Plaintiff/Petitioner was hindered in pursuing a cognizable claim or claims - by the judges granting dismissal and summary judgment [without] subject-matter jurisdiction over case, which is a crime); and thus, (specifically, Plaintiff/Petitioner "actually lost...[an] otherwise valid legal claim of claims, and was [unable] to raise such claims in [any] other proceedings, such as under the FTCA or other statues).

In its analysis, the district court simply attempts to describe Plaintiff/Petitioner's constitutional tort allegations and violations as only, ("in essence", is that [he] was denied access to the courts when the FTCA Litigation was dismissed"), is an erroneous and a willful mischaracterization of Plaintiff's/Petitioner's pleadings as call for under Rule 8(a) of the Fed.R.Civ.P.), and the liberal reading and construing of a *pro se* litigant's pleadings.

In *Harlow*, this Court said:

> "referring both to the objective and subjective elements, we have held that qualified immunity would be defeated if an official "knew or reasonably should have known that the [a]ction he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], *or* if he took the action with the malicious intention to cause a deprivation of constitutional rights [o]r other injury."" *Harlow et al v. Fitzgerald*, 457 U.S. 800; 102 S. Ct. 2727; 73 L. Ed. 2d 396; (1982).

Defendants' took the actions described in the complaint with the clear intentions of depriving [Plaintiff/Petitioner] of his constitutional rights or causing him other [common-law]

injuries as described in the complaint and thereafter in court proceedings since the initial filing.

"The purpose of the statute [42 U.S.C. § 1983] was to deter public officials from using the badge of their authority to violate persons' constitutional rights and to provide compensation and other relief to victims of constitutional deprivations when that deterrence failed." *Carey v Piphus*, 435 US 247, 253 (1978).

It is essential in all courts that the judges who are appointed to administer the law should be permitted to administer it under protection of the law, independently and freely, without favor and without fear, [BUT] this provision of the law is not for the protection or benefit of a malicious or corrupt judge. *Pulliam v. Allen*, 466 U.S. 532, Fn. 7 (1984).

Judicial immunity is not found in the laws written by Congress, but in a self-serving "doctrine" enacted through "judicial legislation." Through this doctrine, the Defendant Judges in this case acted with impunity and believed that they had the absolute power to reject their oath; defy the law; ignore federal statutory legal requirements, and condone error, malicious conduct, corruption, deprivation of constitutional rights, conspiracy, and all manner of evil of themselves, and in turn, conspire with their colleagues simply because they proclaim themselves "immune"; and then conspired with Assistant United States Attorney's in defending them in the case, with the Secretary, VA, a number of other federal employees and other private individuals defendants, all named in the case in their individual capacities, believe that they are also immune based on their claim of 'absolute immunity" or "qualified immunity."

However, again, this Court has said:

> "Referring both to the objective and subjective elements, we have held that *qualified immunity* would be defeated if an official "knew or reasonably should have known that the action he took within his sphere of official

responsibility would violate the constitutional rights of the [plaintiff], *or* if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury." *Harlow et al v. Fitzgerald*, 457 U.S. 800; 102 S. Ct. 2727; 73 L. Ed. 2d 396; (1982)."

Therefore, because the named officials "knew or reasonably should have known that the actions they took within their sphere of official responsibility would violate the constitutional rights of the ["Plaintiff/Petitioner], they are, also for these and other reasons, not entitled to qualified immunity and are not immune. See *Saucier v. Katz*, 533 U.S. 194, 201 (2001), (such immunity is qualified, and government actors who violate clearly established constitutional rights [c]annot benefit from it).

2. The Law as it Pertains to Recusals

Also, at the time of the claimed injuries and prior to the filing of the (07-cv-0598) lawsuit, the Petitioner filed Judicial Misconduct Complaints against the named judges and requested their recusals, which were dismissed by the supervising DC Appellate Court on the grounds that the named judge were all performing [*judicial acts*] as to the conduct being alleged against them. However, in viewing the procedural records it appears that each of the named judges, except one did, at certain points during their presiding over the underlying case, did in fact, recuse themselves by the fact that the case was passed or transferred to 4 different judges over the course of the district court proceedings; and with a fifth overseeing this current related complaint, who also refused to recuse himself.

Canon 3 of the Code of Judicial Conduct (Supreme Judicial Court Rule 3:09) states that "a judge shall disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to

instances where he has a personal bias or prejudice concerning a party, and in 1994, this U.S. Supreme Court held that "disqualification is required if an objective observer would entertain reasonable questions about the judge's impartiality. If a judge's attitude or state of mind leads a detached observer to conclude that a fair and impartial hearing is unlikely, the judge must be disqualified." [Emphasis added]. *Liteky v. U.S.*, 114 S.Ct. 1147, 1162 (1994). The judges subsequent "attitudes and state of mind and rulings in these cases, ("acting without subject-matter jurisdiction on the merits" in direct contravention and violation of a federal statues stating the judges and the Court lacked subject-matter jurisdiction"), showed personal biases prompting or suggesting that an objective observer would entertain reasonable questions about the Judges' impartiality and disqualification was required, and that he or she knew or reasonably should have known that their actions would result in violations of Plaintiff's/Petitioner's constitutional rights and violate federal statues, specifically, 28 U.S.C. § 2679(d)(1) is one such statue.

Courts have repeatedly held that positive proof of the partiality of a judge is not a requirement, only the appearance of partiality. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 108 S.Ct. 2194 (1988) (what matters is not the reality of bias or prejudice but its appearance); *United States v. Balistrieri*, 779 F.2d 1191 (7th Cir. 1985) (Section 455(a) "is directed against the appearance of partiality, whether or not the judge is actually biased.") ("Section 455(a) of the Judicial Code, 28 U.S.C. §455(a), is not intended to protect litigants from actual bias in their judge but rather to promote public confidence in the impartiality of the judicial process."). The Court's classification of Petitioner's claims of Judicial Misconduct as, in essence, a "dissatisfied" or "disgruntle litigant " was improper in view of the court's rulings in this case. Section 455(a), "requires a judge to recuse herself or himself in any proceeding in which [his] impartiality might

reasonably be questioned." *Taylor v. O'Grady*, 888 F.2d 1189 (7th Cir. 1989).

In *Pfizer Inc. v. Lord*, 456 F.2d 532 (8th Cir. 1972), the Court stated "it is important that the litigant not only actually receive justice, but that he believes that he has received justice."

The Supreme Court has ruled and has reaffirmed the principle that "justice must satisfy the appearance of justice", *Levine v. United States*, 362 U.S. 610, 80 S.Ct. 1038 (1960), citing *Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 13 (1954).

Therefore, "Recusal under Section 455 is self-executing; a party need not file affidavits in support of recusal and the judge is obligated to recuse [himself] *sua sponte* under the stated circumstances." *Taylor v. O'Grady*, 888 F.2d 1189 (7th Cir. 1989).

"Judges do not have discretion not to disqualify themselves. By law, they are bound to follow the law. Should a judge not disqualify herself or himself as required by law, then the judge has given another example of his "appearance of partiality" which further disqualifies the judge. None of the orders issued by any judge who has been disqualified by law would be valid. They are void as a matter of law, and are of no legal force or effect."

"Should a judge not disqualify her or himself, then the judge is in violation of the Due Process Clause of the U.S. Constitution." *United States v. Sciuto*, 521 F.2d 842, 845 (7th Cir. 1996) ("The right to a tribunal free from bias or prejudice is based on the Due Process Clause.").

"The Supreme Court has held that if a judge acts after he has been automatically disqualified by law, then he is acting without jurisdiction and engaged in acts of treason to the Constitution." *U.S. v. Will*, 449 U.S. 200, 216, 101 S.Ct. 471, 66 L.Ed.2d 392, 406 (1980).

The bottom line is that the named judges were legally required to recuse themselves from the two cases involving

Petitioner at the instant each were notified of Petitioner's complaint of judicial misconduct against them; and most certainly when the Petitioner specifically requested the presiding judge in the second case (07-cv-0598) to recuse himself and/or allow Petitioner to file an Amended Complaint naming Judge RJL, the then presiding judge, as a defendant in the case in which he was presiding, and in which he denied the motion. Instead, the judge has refused to recuse himself where he was legally required to do so, he denied the motion to file the amended complaint naming him as another defendant in the case, and he has continued to issue and rendered bias and non-impartial decisions and rulings in the case in favor of his colleague judges, other defendants and himself to which he and others have alleged to have conspired to violate Petitioner's constitutional rights and federal statues.

REASONS WHY CERTIORARI SHOULD BE GRANTED:

May It Please The Court:

I. Review is warranted because:

A. The named judges were not immune from civil damages in this case, because they never acquired Article III Federal Statutory "Subject-Matter Jurisdiction" over Petitioner's underlying FTCA case under provisions of the FTCA's and its framework; rendering [a]ll of the district court's rulings, decisions and opinions below, (growing out of the underlying FTCA case at hand), improper, as not taken in accordance with District of Columbia, Federal law and Supreme Court Precedence, to the contrary, null and void. For this single and very important reason alone, the Petition for Writ of Certiorari should be granted.

B. Review is warranted because, in granting motion to dismiss and for summary judgment in the underlying case,

and therefore, in this case[3], the lower court had departed from the accepted standard of review set by this Court in *Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097, 68 USLW 4480, (U.S., Jun 12, 2000); (argued in Writ to this Court, 09-411).

C. Review is warranted because the D.C. Circuit Court also lacked Appellate jurisdiction to review and rule on the merits of this and the underlying case, and improperly sanctioned the district court's dismissals and summary affirmance orders on *Taxpayers watchdog Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam) as to "the merits of the parties positions", and on *Morales v. Waco*, 52 U.S. 9 (1991) for the proposition that "the district court properly dismissed the action against the judges, (describing the conduct alleged against them as *actions* taken in the course of their official capacities), claiming (absolute immunity for judges from damages for acts committed in their judicial capacities).

However, here, judicial immunity nor qualified immunity applied because, where there is ***no jurisdiction, there is no immunity***. A judge must be acting within his jurisdiction as to ***subject matter*** and person, to be entitled to immunity from civil action for his acts. *Davis v. Burris*, 51 Ariz. 220, 75 P.2d 689 (1938).

[If] a judge does not fully comply with the Constitution, then his orders are void and he is without jurisdiction, and engaged in acts of treason to the Constitution. *U.S. v. Will*, 449 U.S. 200, 216, 101 S.Ct. 471, 66 L.Ed.2d 392, 406 (1980).

D. Review is warranted because the *Per Curiam* Summary Action Order issued by the 3-Judge Panel of the DC Circuit (Sentelle, Chief Judge, and Ginsburg and Garland, Circuit Judges), conflicts with all discernable opinions of all other Circuit Courts, as well as its own discernable opinions

[3] The district court also erroneously ruled that the complaint failed to allege or state *any* actionable claims; ("he failed to allege any constitutional violation"). Pet's App. at A-19 at Pages 1 and 3.

that have ever addressed this same important matter or question(s), which is "whether, in the underlying case, and therefore in this case, did the district court have Article III Federal Statutory "Subject-mater Jurisdiction" Authority to hear/review and/or to adjudicate the underlying Case under the FTCA framework"; that also allegedly constituted protrusion and unauthorized reviewed of an inextricable intertwined veteran's benefit claim decision and FTCA claims when the controlling Supreme Law says that ("The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans"), and then therefore, it exercised subject-matter jurisdiction and authority to rule that the judges and other defendants in this and the underlying inextricable intertwined case were all entitled to absolute or qualified immunity as to their conduct in the claims alleged against them growing out of civil actions (02-v-1743) which manifested in, and grew out of civil action (07-cv-0598).

E. The district court's rulings, and the DC Circuit's affirmation of those rulings, if allowed to stand and become precedence, (Civil Actions 09-4359 and 09-5138), although "per carium" in nature, will have and give a very extreme, chilling and damaging effects on every veteran's soldier's rights who may need and have to apply for veteran's disability benefits from the VA, and will constitute and sanction court-intervention, protrusion, intrusion and unauthorized reviewed of inextricable intertwined veteran's benefit claims decisions and FTCA claims at the request of the Secretary himself when it is he, "The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans." However here, the courts have made those decision(s) for him, which was improper.

And, as to "judicial immunity", "unconferred", it would allow the judges to abrogate the principles laid down in *Bradley*, that "when a judge knows that he lacks jurisdiction, or acts in the face of clearly valid statutes or case law expressly depriving him of jurisdiction, judicial immunity is lost. See *Bradley v. Fisher*, 80 U.S. (13 Wall.) at 351 ("when the want of jurisdiction is known to the judge, [n]o excuse is permissible"); *Turner v. Raynes*, 611 F.2d 92, 95 (5th Cir. 1980) (*Stump* is consistent with the view that "a clearly inordinate exercise of unconferred jurisdiction by a judge-one so crass as to establish that he embarked on it either knowingly or recklessly-subjects him to personal liability").

II. Jurisdiction and Legal Standard

Whether a public official is entitled to absolute immunity is a question of law that is reviewed de novo." *Goldstein v. City of Long Beach*, 481 F.3d 1170, 1172 (9th Cir. 2007).

It has long been established that judges are absolutely immune from liability for acts "done by them in the exercise of their judicial functions." *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 347 (1871). The Supreme Court has extended such absolute immunity to other public officials who perform activities that are "functionally comparable" to those of judges. *Butz v. Economou*, 438 U.S. 478, 513 (1978); *see also Sellars v. Procunier*, 641 F.2d 1295, 1303 (9th Cir. 1981) ("If an official's role is functionally equivalent to that of a judge, the official will be granted equivalent immunity."). Such activities are sometimes referred to as "quasi-judicial." *See, e.g., Imbler v. Pachtman*, 424 U.S. 409, 420 (1976). "Absolute immunity flows not from rank or title . . . but from the nature of the responsibilities of the individual official." *Cleavinger v. Saxner*, 474 U.S. 193, 201 (1985).

The Court has outlined a list of factors to consider in determining whether an official's functions are quasi-judicial in nature: (1) the need to insulate the official from harassment

or intimidation; (2) the presence of procedural safeguards to reduce unconstitutional conduct; (3) insulation from political influence; (4) the importance of precedent in the official's decision; (5) the adversary nature of the process; and (6) the correctability of error on appeal. *Id.* at 202 (citing *Butz*, 438 U.S. at 512). This list of factors is nonexhaustive, however, and an official need not satisfy every factor to be entitled to absolute quasi-judicial immunity. *See Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 923 (9th Cir. 2004) (noting that the *Butz* factors are "nonexclusive").

However, the absolute immunity normally accorded officials performing quasi-judicial functions does not extend to "actions, though judicial in nature, taken in the complete absence of all jurisdiction." *Marales v. Waco*, 502 U.S. 9, 12 (1991). Where the official acts merely in excess of his authority, however, he will not be deprived of immunity; "rather, he will be subject to liability only when he has acted in the 'clear absence of all jurisdiction.' " *Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978) (quoting *Bradley*, 80 U.S. (13 Wall.) at 351). "Jurisdiction should be broadly construed to effectuate the policies supporting immunity." *Ashelman v. Pope*, 793 F.2d 1072, 1076 (9th Cir. 1986) (en banc); *see also Stump*, 435 U.S. at 356 ("Because 'some of the most difficult and embarrassing questions which a judicial officer is called upon to consider and determine relate to his jurisdiction . . . ,' the scope of the judge's jurisdiction must be construed broadly . . . ." (quoting *Bradley*, 80 U.S. (13 Wall.) at 352)) (citation omitted).

"In determining judicial immunity, we have distinguished between acts "in excess of jurisdiction" and acts "in the clear absence of jurisdiction" by looking to the subject matter jurisdiction of the judge: "[a] clear absence of all jurisdiction means a clear lack of all subject matter jurisdiction." *Mullis v. U.S. Bankr. Court, Dist. of Nev.*, 828 F.2d 1385, 1389 (9th Cir. 1987).

The necessary inquiry in determining whether a defendant judge is immune from suit is whether, at the time he took the challenged action, he had jurisdiction *over* the subject matter before him.

In this case, the named judges and other named federal employees and officials acted in [a] clear absence of all jurisdiction, [a] clear lack of "all subject-matter jurisdiction".

The doctrine of absolute judicial immunity for judges and qualified immunity for other federal official performing quasi-functions *does not* extend to "actions, though judicial in nature, taken in the complete absence of all jurisdiction." *Marales v. Waco*, 502 U.S. 9, 12 (1991).

A. Motion to Dismiss for Lack of Jurisdiction

Subject-matter jurisdiction may be raised at any stage of proceedings, to including on appeal.

Federal courts are courts of limited jurisdiction and the law presumes that "a cause lies outside this limited jurisdiction."[4] *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511

[4] The Federal Tort Claims Act (FTCA), ch. 753, § 401, 60 Stat. 842, confers jurisdiction on the district courts to hear tort suits arising out of the "negligent or wrongful act or omission of any employee of the Government "while acting *within* the scope of his office or employment", under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. 1346(b)(1) (Supp. III 1997). The FTCA makes the United States liable in tort "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C.2674. In turn the Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, 102 Stat. 4563, commonly known as the *Westfall Act*, provides individual government employees with an immunity from personal liability by substituting the United States for them as the defendant if the Attorney General or her delegate certifies that the employees were acting within the scope of their employment. 28 U.S.C. §§ 2679(b) and (d); see generally *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 425-426 (1995). [O]nce the United States has been substituted as the defendant, the case proceeds as an action under the

U.S. 375, 377 (1994). Because subject matter jurisdiction is an Article III as well as a statutory requirement, "no action of the parties can confer subject[]matter jurisdiction upon a federal court.'" *Akinseye v. District of Columbia*, 339 F.3d 970, 971 (D.C. Cir. 2003).

On a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) or by the court sau sponte under 12(h)(3), the plaintiff bears the burden of establishing that the court has subject matter jurisdiction. *Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999); *see also McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 182-83 (1936).

Because subject matter jurisdiction focuses on the court's power to hear the claim, however, the court must give the plaintiff's factual allegations closer scrutiny when resolving a Rule 12(b)(1) or Rule 12(h)(3) motion than would be required for a Rule 12(b)(6) motion for failure to state a claim. *Macharia v. United States*, 334 F.3d 61, 64, 69 (D.C. Cir. 2003). Moreover, the court is not limited to the allegations contained in the complaint. *Hohri v. United States*, 782 F.2d 227, 241 (D.C. Cir. 1986), *vacated on other grounds*, 482 U.S. 64 (1987). Instead, to determine whether it has jurisdiction over the claim, the court may consider materials outside the pleadings. *Herbert v. Nat'l Acad. of Scis.*, 974 F.2d 192, 197 (D.C. Cir. 1992).

Here, the legal standard applied was simply inapplicable. First, because the claims alleged in the complaint are all claims that grew out of and underlying related FTCA complaint, where plaintiff had alleged that the court in the underlying case has allegedly acted and ruled on the merits of that complaint without ever possessing subject matter jurisdiction, because the U.S. Attorney General failed to issue *Westfall Act Certifications* in the underlying complaint

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FTCA. 28 U.S.C. 2679(d)(4).

certifying "scope of office or employment" as to each employee-defendant, the district court never acquired the required Article III constitutional and/or statutory subject-matter authority, and by acting and ruling on the merits without "subject-matter jurisdiction, without "all jurisdiction" in the first instance in the underlying case, and committed constitutional and common law torts causing Plaintiff/Petitioner injury, for which the judges and the other named defendants are not immune. Second, the United States was never substituted as party defendant in the underlying case, and thus the district court's subject-matter jurisdiction was never invoked as required pursuant to (28 U.S.C. § 2679(d)(1), depriving the district court of "all federal subject-matter jurisdiction" and from ever reaching the merits of the case and claims under the FTCA framework, and further deprives all named federal employee-defendants' of even *Westfall Act* immunity, subjecting them to personal liability.

The district court's memorandum of dismissal of Petitioner's Second Amended Complaint and analysis of the claims therein that grew out of the underlying (02-v-1743) complaint, that is based on grounds that (1) the judge were dismissed from the case on the grounds that they had absolute immunity for their judicial acts committed within their jurisdiction, and (2) Thomas's constitutional tort claims must be dismissed because the remaining defendants are also immune from them, based on their qualified immunity; and (3) that in its discretion to determine whether a constitutional violation occurred, and if so, whether the right was clearly established, was clearly erroneous and not in accordance with governing law for the reasons alleged above, herein and elsewhere, and the DC Circuit Court Summary Affirmance Action Orders or likewise erroneous and not in accordance with the cited governing law.

For the reasons already stated the DC Circuit's Summary Affirmance of those opinions, both conflicts with the cited

legal standard and legal authorities cited by Defendants/ Respondents in Paragraph II A. *Kokkonen v. Guardian_Life. Co. of Am.,* 511 U.S. 375, 377 (1994), (Federal Courts are courts of limited jurisdiction and the law presumes that "a cause lies outside this limited jurisdiction."). *Akinseye v. District of Columbia*, 339 F.3d 970, 971 (D.C. Cir. 2003), (because subject-matter jurisdiction is an Article III as well as a statutory requirement, "no action of the [p]arties can confer subject[]matter jurisdiction upon a federal court."). Here, it was only pursuant to a provision of the *Westfall Act*, Federal Statute 28 U.S.C. § 2679(d)(1), that the district Court's subject-matter jurisdiction [m]ay be invoked under the FTCA). Since subject matter jurisdiction was never invoked by U.S. Attorney General's Scope of Office or Employment Certifications in the underlying case. (28 U.S.C. § 2679(d)(1). The district court never acquired subject-matter jurisdiction, and because the judges acted [without] subject-matter jurisdiction in the underlying case, they lost their immunity and are not immune from damages in this case.

This being the case, the district court's initial memorandum opinions of March 20, 2008 granting dismissal and summary judgment in the underlying case in the first instance, its subsequent memorandums of December 11, 2008, sau sponte dismissing the named judges, and the DC Circuit's affirmance of both of those opinions, in accordance with the governing laws of this Supreme Court and the land, are all null and void and their opinions should be reversed. And, because "Judicial immunity" does not apply to the named judges because, where there is [*no jurisdiction*], [*there is no immunity*]. *Bradley v. Fisher*, 80 U.S. at 352; *Marales v. Waco*, 502 U.S. 9, 12 (1991), and therefore, the district court exercises subject-matter jurisdiction over Plaintiff's/Petitioner's "new" case, Civil Action Complaint Number: (07-cv-0598) and all claims alleged therein.

B. Failure to Allege a Constitutional Violation

Review of a district court's grant of a motion to dismiss is de novo. Dismissal for failure to state a claim is appropriate *only* when it clearly appears that the plaintiff can prove no set of facts to support the claim which would entitle him or her to relief. See *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).• Such a motion tests the legal sufficiency of a claim accepting the veracity of the claimant's allegations. *Pro se* pleading are reviewed under a liberal standard, and all well pled factual allegations are accepted as true.

The district court's attempt to simply described Plaintiff/Petitioner's constitutional tort allegations and violations in the 58-page Amended Complaint as only, ("in essence", is that [he] was denied access to the courts when the FTCA Litigation was dismissed"), is an erroneous analysis and a willful mischaracterization of Plaintiff's/Petitioner's pleadings as call for under Rule 8(a) of the Fed.R.Civ.P.), and the liberal reading and construing of a *pro se* litigant's pleadings. The allegation and proof of that a judge or tribunal acted without "subject matter jurisdiction" is, in itself, a constitutional violation and a crime. ([If] a judge does not fully comply with the Constitution, then his orders are void and he is without jurisdiction, and engaged in acts of treason to the Constitution). *U.S. v. Will*, 449 U.S. 200, 216, 101 S.Ct. 471, 66 L.Ed.2d 392, 406 (1980).

Conclusion

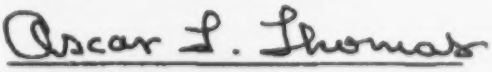
• Plaintiff Complaint clearly made reference to 42 U.S.C. § 1983, *does* allege constitutional violations and common law torts in a context sufficient to support original subject matter jurisdiction, and meets the requirement set forth in Fed. R. Civ. P. Rule 8(a) that pleadings contain a "short and plain statement" of the cause of action is to give notice to the defendant of the nature of the plaintiff's claim, and the grounds upon which it rests. Fed. R. Civ. P. Rule 8(a).

For the cited important national interest reasons, the needs to guard and preserve all citizens of veterans' constitutional and statutory protected rights and benefits, resolved important questions of federal law, which is inextricably intertwined and have not been, but should be settled by this Court the petition for writ of certiorari should be granted.

The judgment of the district court dismissing all claims against the named Judges and other named official and the DC Appellate Court's affirmance of same base on absolute immunity, and the other named defendants based on qualified immunity, and (because the complaint clearly states constitutional and common law tort claims), should be reversed and remanded for further proceedings consistent with this Court's reversal opinion.

It is further requested that this Court direct the award to Petitioner of all of his costs and expenses in filing all district court complaints and claims, Appeals Court Actions and Writ(s) of Certiorari with this Court in this matter.

Respectfully Submitted,



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